United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 12, 2007

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Boeing Company 524-8393-0155
Case 19-CA-30745 524-5393-5088

The Region submitted this case for advice as to whether, in light of the General Counsel's position in The Register Guard,[1] the Employer's e-mail policy was lawful both on its face and also as interpreted to discipline an employee for sending a non-work related, external broadcast or "mass" e-mail.

We conclude that the Employer's written policy is facially valid because it allows limited personal e-mail use and explicitly allows employees to use e-mail to communicate with each other regarding Union- and Section 7-related matters. We further conclude that the Employer has lawfully interpreted its policy to prohibit the employee's mass e-mail in this case. The Employer's interpretation to prohibit mass e-mails is content-neutral, but consistent with its written policy explicitly allowing employees to use e-mail for Union- and Section 7-related communications. Moreover, the prohibition was consistent with the Employer's previous interpretation and enforcement of its policy, and there is no evidence of disparate treatment. Finally, our analysis is not controlled by the General Counsel's position in Register Guard because this e-mail does not involve a core Section 7 communication among co-workers regarding their terms and conditions of employment. In these circumstances, the Region should dismiss this charge, absent withdrawal.

FACTS

The Boeing Company (the Employer) is an aerospace company with more than 150,000 employees across the country, and in over 70 countries. Boeing engineers in Washington State are represented by Society of Professional Engineering Employees in Aerospace, IFTPE Local 2001 (the

[1] Cases 36-CA-8743, et al., JD(SF)-15-02 (2002).

Union). The Employer and the Union have an established collective-bargaining relationship, memorialized in a series of contracts.[2]

The Alleged Unfair Labor Practice

The alleged discriminatee is a Union representative for a group of approximately 200 unit employees. In December 2006, he received an e-mail message, forwarded to him by a Union council representative, announcing a UFCW-sponsored rally to protest Wal-Mart's "labor practices." The alleged discriminatee forwarded the message and the attached rally announcement to his group of employees.

In early January 2007, a human resources representative notified the alleged discriminatee that the Employer had received an anonymous complaint regarding his forwarded message, and that his e-mail was an inappropriate use of the Employer's system. The human resources representative asked the alleged discriminatee to estimate how many employees he forwarded the message to. The alleged discriminatee told the Employer that the message was intended to communicate "community issues" to Union members, and that he sent it to his group of approximately 215 unit employees.

On February 26, 2007, the alleged discriminatee and his Union representative met with a manager and a human resources representative to discuss the matter. At that meeting, the manager issued the alleged discriminatee written discipline for sending "non-work related e-mail to a large distribution" in violation of the Employer's policy. The alleged discriminatee pointed out to the Employer's representatives that the written policy does not expressly limit the number of e-mail recipients. When the alleged discriminatee asked what would be an acceptable number for distribution, the human resource representative replied that she didn't know, but thought the limit was 40.

The Employer's E-Mail Policy

The Employer allows employees to use its communication system and networks, including e-mail and internet systems, for limited personal use. The Employer's policy explicitly

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[2] Neither the Employer nor the Region has addressed whether it would be appropriate, under Collyer Insulated Wire, 192 NLRB 837 (1971), to defer this matter to any contractual grievance-arbitration procedure. We therefore do not address that issue here.

grants employees the right to use e-mail to "send messages with union-related content, or that reasonably concern efforts to improve their terms and conditions of employment[.]"

The Employer's policy does not expressly prohibit mass e-mails nor explicitly require that personal e-mails be limited to a certain number of recipients. Rather, the policy requires that personal use of the e-mail system be "of reasonable duration and frequency." Additionally, personal e-mail must "not compromise the security or integrity of company information or software" nor "interfere with the performance of company business, the employee's assigned duties, or the duties of other employees [nor] adversely affect the performance of the employee or the employee's organization." The Employer's policy further states, "E-mail may not be used for external broadcast messages or to send or post chain letters, messages of a political or religious nature, or messages that contain obscene, profane, or otherwise offensive language or material that violate company policy or procedure[.]" The Employer explains that his aspect of its policy is designed to avoid burdening its system with messages it deems "non-work related" (i.e., not relevant to unit employees' Union activities, unit employees' terms and conditions of employment, or company business).

The Region's investigation disclosed evidence that the Employer has previously disciplined employees who: sent non-work related e-mails to large distribution lists, attached to e-mail large files that adversely affected the e-mail system and employees' e-mail accounts, or violated certain content restrictions. The investigation also disclosed evidence that certain employees and Union representatives have sent mass e-mail messages to more than 200 recipients without incident. However, neither the Union nor the Region adduced any evidence that the Employer had actual or constructive knowledge of mass e-mail messages sent by Union representatives.[3]

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[3] The Employer acknowledges that it allows Union representatives to send e-mails to elected or appointed representatives who work directly with unit employees. However, the Employer claims it has never allowed Union representatives or employees to send "mass" e-mails to 200 or more recipients.

ACTION

The Region should dismiss this charge, absent withdrawal. We conclude that the Employer's written policy is facially valid because it allows limited personal e-mail use and explicitly allows employees to use e-mail to communicate with each other regarding Union- and Section 7-related matters. We further conclude that the Employer has lawfully interpreted its policy to prohibit the employee's mass e-mail in this case. The Employer's interpretation to prohibit mass e-mails is content-neutral, but consistent with its written policy explicitly allowing employees to use e-mail for Union- and Section 7-related communications. Moreover, the prohibition was consistent with the Employer's previous interpretation and enforcement of its policy, and there is no evidence of disparate treatment. Finally, our analysis is not controlled by the General Counsel's position in Register Guard because this e-mail does not involve a core Section 7 communication among co-workers regarding their terms and conditions of employment.

The Employer's Written Policy and its Interpretation are Facially Valid

It is axiomatic that an employer's rule is unlawful if it "would reasonably tend to chill employees in the exercise of their Section 7 rights."[4] The Board, however, will find work rules lawful if a reasonable employee would not construe them to prohibit protected activity.[5]

Applying these principles, we first conclude that the Employer's written rule is lawful on its face. As noted above, the rule explicitly allows employees to use its e-mail system to send Union-related e-mail messages and for activities related to their efforts to improve their terms and conditions of employment. Given these express provisions, a reasonable employee would not construe the Employer's rule against external broadcast messages or political e-mails as restraining employee Section 7 communications.

The Employer's interpretation of the rule prohibiting external broadcast messages to also prohibit "mass" emails also is not an impermissible restraint on Section 7 activities. The interpretation does not address the

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[4] Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

[5] See, e.g., Lutheran Heritage, 343 NLRB 646, 647 (2004).

content of any e-mail, only its effect on the Employer's ability to conduct its business and employees' ability to perform their duties. We have previously found that the Employer's rule against mass e-mails strikes a reasonable balance between employees' Section 7 rights and the Employer's legitimate business interest in ensuring the proper functioning of its email system.[6]

The Employer Lawfully Enforced its Interpreted Rule

An employer may not discriminatorily limit employees' use of email.[7] Thus, where an employer has permitted employees to routinely use its e-mail and/or computer systems to send a wide variety of non-work related material, a prohibition against sending union-related e-mail messages is discriminatory.[8] However, the Board will not find a violation where an employer consistently enforces facially valid rules, or lawful interpretations of its rules.[9]

The available evidence revealed no discrimination but rather showed that the Employer has consistently enforced its ban on mass e-mails. The Employer has issued written discipline to other employees who used the e-mail system to forward a variety of messages to large distribution lists, regardless of content. There is no evidence that the Employer monitors employees' personal use of e-mail or independently reviews e-mail records. Thus, there is no evidence that the Employer had actual or constructive knowledge that Union officials occasionally used the Employer's e-mail system to send mass e-mails. In these circumstances, there is no basis to argue that the Employer

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[6] See e.g., Boeing Co., Cases 19-CA-28900 and 19-CA-28964, Advice Memorandum dated May 4, 2004.

[7] See E.I. du Pont & Co., 311 NLRB 893, 919 (1993).

[8] Id.

[9] See, e.g., St. Francis Medical Center, 347 NLRB No. 35, slip op. at 1 (2006) (no evidence that employer disparately enforced its posting policy); Timken Co, 331 NLRB 744, 755 (2000) (employer lawfully and consistently enforced its bulletin board policy; evidence was too "generalized, vague, imprecise" to establish union's claim of disparate treatment).

disparately enforced its policy against the alleged discriminatee.[10]

This Case Is Not Controlled by the General Counsel's Position in *Register Guard*

The narrow issue in Register Guard was the validity of the employer's complete ban on its employees' use of the employer's e-mail system for non-business purposes. The General Counsel argued that because such a policy would prohibit employees from exercising their core Section 7 right to organize in a mode that is most natural in the technological work place, it should be presumptively unlawful and forbidden absent special circumstances.

In contrast to the policies addressed in Register Guard, the Employer's written policy here explicitly allows employees to use e-mail for Union matters and for matters related to their efforts to improve their terms and conditions of employment. Moreover, the Employer's consistent, content-neutral interpretation of that policy has not precluded any unit employee from engaging in the kind of conduct - i.e., communicating with co-workers regarding core Section 7 activities – at issue in Register Guard.

The conduct that was the subject of the discipline here – the distribution of information about a rally protesting another employer's labor practices - is more attenuated than the Section 7 right at issue in Register Guard – workers' communications among themselves about their own terms and conditions of employment.[11] Accordingly, the General Counsel's position in Register Guard is not dispositive of the issue here.

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[10] See, e.g., St. Francis, above; Timken, above.

[11] Cf., e.g., Applebee's Neighborhood Bar & Grill, Case 30-CA-17444 Advice Memorandum dated October 17, 2006 (leaving unresolved whether attendance at or support of immigration rally is protected by Section 7).

In sum, the Employer's policy is facially lawful, and its interpretation and enforcement of that policy has been consistent and lawful. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.